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No. 91-1973

Supreme Court, U.S.
FILED
JUL 2 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES, AND MJM VENTURES,

Petitioners,

v.

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK, CO., BERT GAMBLE, RIO BRAVO OIL CO., INC., ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RIO BRAVO OIL CO., INC. AND BERT GAMBLE'S ("RESPONDENTS") BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Does the record that was before the appellate and trial court support the grant of summary judgment for Rio Bravo Oil Co., Inc. and Bert Gamble when Petitioners failed to set forth specific facts and establish a genuine issue worthy of trial?

INTERESTED PARTIES

PETITIONERS

MICHAEL K. TOPALIAN, WARREN B. FIENGA, ROY JACOBS, JR., RICHARD OROZCO, JUAN GARCIA-QUIROGA, JEAN STEUBING, CHARLES W. ANDERSON, FRANCIS D. COVERT, RICHARD H. MANUEL, JACK E. BURROUGHS, DON W. BOYETT, BOBBY W. McDONALD, CHARLES F. LACELLE, RICHARD D. MIKLES AND MJM VENTURES, A PARTNERSHIP

RESPONDENTS

JOHN N. EHRMAN, EHRMAN INVESTMENT GROUP, INC., W. RODERICK JOHNSON, W. RODERICK JOHNSON, P.C., RICHARD O'DONNELL, HOUSTON PETROLEUM CO., INC., JOEL A. MIDDLEBROOK, JOEL A. MIDDLEBROOK, CPA, VICTOR B. RUSSEK, RUSSEK CO., BERT GAMBLE, RIO BRAVO OIL CO., INC.,[1] ROCKWOOD INSURANCE CO. AND ROBERT E. ECKIS, JR.

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[1] Rio Bravo Oil Co., Inc. is a subsidiary of the Wichita River Oil Corporation.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RIO BRAVO OIL CO., INC. AND BERT GAMBLE'S ("RESPONDENTS") BRIEF IN OPPOSITION

Respondents, Rio Bravo Oil Co., Inc., (Rio Bravo) and its President Bert Gamble (Gamble) respectfully request

that this Court deny the petition for writ of *certiorari*, seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The opinion of the Fifth Circuit is reported at 954 F.2d 1125 (5th Cir. 1992).

STATEMENT OF THE CASE

Petitioners fail to raise any special or significant reasons to warrant granting their petition for writ of certiorari. The arguments made by Petitioners involve issues that are well settled and do not involve conflicting decisions between the United States courts of appeals. This statement will describe the pertinent facts omitted from Petitioners' statement of the case.

A. Factual Background

Onshore Exploration, Ltd., 1984 Mid-Year Drilling Program ("Onshore") was a limited partnership formed in 1984 under Texas law to participate in oil and gas drilling ventures. The general partners of Onshore decided to raise capital for the venture by selling limited partnership units. Two offering memoranda, which explained the risks of investing in Onshore, were made available to investors. The offering of units in Onshore was made primarily to accredited investors pursuant to Rule 506 of Regulation D (17 C.F.R. Sec. 230.506) promulgated by the Securities & Exchange Commission. Each petitioner signed various subscription documents in which they acknowledged that they had read the Offering

Memorandum and understood the risks of this particular investment.

Rio Bravo's only connection with Onshore is a contractual relationship. On or about December 17, 1984, Onshore and Rio Bravo entered into two letter agreements and two operating agreements covering drilling on the Southwest Cuero and Sheriff Prospects. Rio Bravo drilled these wells in accordance with the terms of the respective agreements. Onshore paid some but not all of the amounts owed Rio Bravo under the agreements.

This suit was filed in December 1987, by fifteen of seventy-seven investors in Onshore alleging various securities fraud, RICO and other pendent state law claims in connection with the organization of Onshore. Petitioners claim they were induced to buy units as a result of oral misrepresentations made to them prior to their purchase. Petitioners sought recovery against twenty-four defendants, including Rio Bravo and its President, Bert Gamble.

On March 20, 1989, the parties agreed to, and the District Court signed, a Discovery & Scheduling Order which established various deadlines including: (i) June 15, 1989, for filing of dispositive motions and (ii) July 10, 1989, for filing responses to such motions. This order also scheduled a hearing for 9:30 a.m. on July 28, 1989, to consider any pending motions (B. 1-9)[2].

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[2] The Appendix to the Petition is referred to as "A." The Appendix to this Brief in Opposition is referred to as "B." The Petition is referred to as "P."

Discovery undertaken in this action has been extensive, voluminous and costly. A summary of the discovery includes:

1. Document requests were exchanged between each of the fifteen petitioners and at least seven of the respondents, pursuant to which thousands of pages of documents were produced and examined.

2. Petitioners and all respondents each propounded and answered multiple sets of interrogatories.

3. Petitioners submitted voluminous requests for admissions to various respondents, including 158 to Victor B. Russek, 233 to W. Roderick Johnson, and 621 separate requests for admissions to John N. Ehrman, the actual organizer of Onshore.

4. Oral depositions were taken of twelve of the fifteen petitioners, as well as several investors who were not parties to this suit.

5. Petitioners took the oral depositions of representatives of Rio Bravo, Houston Petroleum Company and Rockwood Insurance. They deposed the former general partners of Onshore, as well as Ms. Middlebrook and Mr. Russek who had introduced Rio Bravo to Onshore and Mr. Ehrman.

6. Petitioners also deposed Frank Legio, who had performed an audit of the Rio Bravo accounts.

Despite the extensive discovery taken over more than a year and involving tens of thousands of pages of documents and deposition transcripts, Petitioners failed to

produce any deposition testimony or any document in response to the Motion for Summary Judgment (the "Motion") filed by Rio Bravo and Gamble (B. 10).[3]

B. Procedural Background

On June 15, 1989, after completion of discovery and pursuant to the Agreed Discovery and Scheduling Order of March 20, 1989, Rio Bravo and Gamble filed the Motion (B. 10). The Motion was supported by competent evidence in the form of sworn affidavits and deposition excerpts. The affidavit of Bert Gamble contained testimony that neither Rio Bravo nor Gamble was involved in (1) the organization, operation, or internal workings of Onshore, (2) the raising of capital by Onshore or (3) the selling of limited partnership interests in Onshore. Gamble further swore that neither Rio Bravo nor he had ever acquired, maintained, or owned any interest in Onshore or in any way controlled Onshore (B. 14-18). Additionally, excerpts from the deposition testimony of numerous Petitioners established that they had never discussed their investment in Onshore with Gamble or Rio Bravo and had no personal knowledge regarding the claims against Rio Bravo and Gamble. Rio Bravo and Gamble's evidence was substantially more than a "general denial of wrongdoing" (P. 14 ¶ 1).

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[3] A copy of the Motion and supporting affidavit (without its exhibits) is included in the appendix as B. 10-18. A copy of Petitioners' reply is included as B. 19-28. A copy of Rio Bravo and Gamble's response to Petitioners' reply (without its exhibits) is included as B. 29-37.

On July 28, 1989, Petitioners filed an untimely Response (the "Response" (B. 19-28)) to the Motion which the trial court agreed to consider (A. 76). Despite the extensive discovery which had gone on in this case, the Response was not supported by any affidavits or depositions, did not allege any deficiency in the form or substance of the Motion, and did not direct the trial court to any portion of the record which would establish a disputed issue of material fact. The Response contained only references to the pleadings and unsworn assertions of what Petitioners would prove if given the chance to proceed to trial. As noted by the district court, Petitioners failed to "supply the Court with any evidence to contradict the [Rio Bravo and Gamble] Motion" (A. 63-65). As a result, on October 24, 1989, the district court granted summary judgment in favor of Rio Bravo and Gamble (A. 66). The Fifth Circuit panel affirmed the district court's decision, concluding that Petitioners failed to point out specific facts or evidence which established a genuine issue worthy of trial (A. 10-25).

For the first time on appeal and again before this Court, Petitioners point to evidence not part of the record before the district court to support their position on appeal. Specifically, Petitioners argue that a draft of a proposed pre-trial order and an SEC enforcement action against two of the respondents (not Rio Bravo or Gamble) establish the existence of material fact issues which should have prevented the entry of summary judgment as to all respondents. The Fifth Circuit panel properly refused to consider such "evidence."

REASONS THE PETITION SHOULD BE DENIED

I. THIS IS AN APPEAL FROM THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BY A DISTRICT COURT WHICH APPLIED THE PROPER STANDARD IN DECIDING THE CASE.

A. PETITIONERS FAILED TO ESTABLISH A LEGAL OR FACTUAL BASIS FOR DENIAL OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

The grant of summary judgment in federal court is governed by Fed. R. Civ. P. 56. Specifically, Rule 56(c) provides the standard upon which summary judgment is to be granted:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Few rules have received as much judicial consideration as Rule 56. This Court has recognized that Rule 56(c) places the burden on the moving party to show that no genuine issue of material fact exists. A "material fact" is one that might affect the outcome of a suit due to its legal import. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-258 (1986).

Rule 56 must be read not just to protect non-movants with real claims, but also to protect the rights of movants to dispose of baseless claims. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). This Court has recognized that under Rule 56(c), the movant has the initial responsibility of

informing the Court of the basis for its motion by identifying those portions of the record which reveal that there is no genuine fact issue. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Once a movant has done this, the burden shifts to the opposing party to submit affidavits or other competent evidence of specific facts to establish that there is a genuine issue of material fact for trial.

The non-movant must do more than show that there is some "metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586; *Anderson*, 477 U.S. at 249-50. Unsupported allegations are insufficient to either support or defeat a motion for summary judgment. *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985). A party opposing a motion for summary judgment may not rest on the mere allegations or denials of his pleadings, but must set forth specific facts upon which there is a genuine issue for trial. Further, the party opposing a summary judgment motion does not have the right to withhold his evidence until trial. *Anderson*, 477 U.S. at 248-49; *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 288 (1968); *C.F. Dahlberg & Co., Inc. v. Chevron U.S.A., Inc.*, 836 F.2d 915, 920 (5th Cir. 1988).

Petitioners' sole legal argument seems to be that the trial court erroneously applied the decision in *Celotex, supra*. The major holding in *Celotex* is that a defendant, as a party moving for summary judgment, need not offer affidavits in support of a motion for summary judgment. Additionally, this Court clarified the relationship between summary judgment procedure and the burden of proof, saying:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who failed to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex, 477 U.S. at 322-23.

Unlike the movant in *Celotex*, Rio Bravo, Gamble and the other respondents produced specific, affirmative evidence that negated the Petitioners' claims against them.

In response, Petitioners did not contradict any portion of the affidavit or deposition excerpts which supported the Motion. The Response did not allege any deficiencies in the factual or evidentiary basis for the Motion. The Response did not offer any evidence that there was a genuine issue for trial. After months of discovery, generating tens of thousands of pages of depositions and documents, Petitioners were unable to produce any evidence or testimony from the Petitioners or anyone else to support their allegations against Rio Bravo or Gamble.

Contrary to the requirements of Rule 56, Petitioners refused to submit evidence in response to the Motion, promising instead, that they would have evidence at trial sufficient to prove their allegations. The Response was replete with phrases such as: "Plaintiffs contend that the evidence will establish," (B. 22), "Plaintiffs possess evidence which will establish . . . " (B. 22); "At the trial on the merits, Plaintiffs will be able to clearly show . . . " (B. 22); "Plaintiffs will show at trial . . . " (B. 25). Nowhere, however, have Petitioners told the trial court, the Court of Appeals, or this Court, for that matter, what this evidence might be nor how they would prove their allegations.

As the court said in *McLemore v. Landry,* 668 F. Supp. 531 (N.D. La. 1987) *aff'd,* 898 F.2d 996 (5th Cir. 1990) *cert. denied,* 111 S. Ct. 428 (1990):

> . . . At some point in every case, plaintiffs must lay down the shield of nonspecific possibilities and come forth with specific facts, which, if proved, will actually establish liability on the part of the defendants. For these plaintiffs, that time is now. They have failed to do so after having been granted every reasonable opportunity.

For Petitioners that time was when the Response was filed. They failed to do so, and summary judgment was appropriate.

B. THE DOCUMENTS THAT PETITIONERS ALLEGE CREATED DISPUTED FACT ISSUES ARE NOT PART OF THE SUMMARY JUDGMENT EVIDENCE, ARE NOT EVIDENTIARY AND DO NOT CREATE A FACT ISSUE

For the first time on appeal and again before this Court, Petitioners assert that the existence of fact issues is established by (1) an SEC enforcement action against two of the other respondents, and (2) by a draft of a proposed pre-trial order filed by all respondents while summary judgment motions were pending. None of these arguments was presented to the trial court and the documents referred to were not part of the record before the trial court. The documents referred to in Petitioners' brief do not constitute "evidence" as required by Rule 56, and none of them shows the existence of any disputed fact issues involving Rio Bravo and Gamble.

An important principal governing review of summary judgments, which has apparently been ignored by Petitioners, is that a reviewing court cannot enlarge upon the record that was before the district court at the time summary judgment was granted. Evidence not presented to the trial court for consideration of or in response to a motion for summary judgment are never properly before the reviewing court on an appeal from the judgment granting the motion. *Munoz v. International Alliance of Theatrical Stage Employees*, 563 F.2d 205, 209 (5th Cir. 1977); *Auto Drive-Away v. ICC*, 360 F.2d 446 (5th Cir. 1966).

Neither Rio Bravo nor Gamble were parties to the SEC enforcement action and no claims of wrongdoing were made against Rio Bravo or Gamble. Those pleadings

cannot constitute evidence that should have prevented the trial court in this case from entering summary judgment as to Rio Bravo or Gamble. The mere filing of a lawsuit against another party is not competent evidence of any wrongdoing by that party, let alone other entities. Any reference by Petitioners to that enforcement action is irrelevant and designed to mislead the Court.

Next, Petitioners suggest that a draft of a proposed pretrial order offered by all respondents after Rio Bravo and Gamble's summary judgment motion was filed, but before it was granted, is proof of disputed fact issues. Petitioners' assertion is wrong because the proposed order was no more than an informal pleading.

In *Taylor v. Allis Chalmer Mfg. Co.*, 320 F. Supp. 1381 (E.D. PA. 1969), *affirmed* 436 F.2d 416 (1970 *per curiam*), the court held that statements made by a party in its pre-trial order were not admissions which could be used against the party. The *Taylor* court recognized an important distinction between formal pleadings, such as the complaint or answer, which frame the issues, and less formal pleadings which are intended to provide some guidance to the court in the management of the case. The *Taylor* case was cited with approval by this Court in *Hardy v. Johns-Manville Sales Corp.*, 851 F.2d 742, 746 (5th Cir. 1988).

In the summary judgment context, Rule 56 sets the standard for the type of evidentiary basis necessary to raise a fact issue. In *Helmich v. Kennedy*, 796 F.2d 1441 (11th Cir. 1986), the court held that statements of fact in a brief filed in a trial court could not be considered in determining whether a fact issue existed to defeat summary judgment. The court noted that the brief was to

serve an entirely different function than an affidavit, which was specifically recognized under Rule 56, and that such statements, even though made by an agent of the party, could not be considered summary judgment evidence. *See Garza v. Chicago Health Clubs, Inc.*, 347 F. Supp. 955, 964 (N.D. Ill. 1972) (statements made in a brief, but not in affidavit form, cannot be given weight on motion for summary judgment); *Leggieri v. Mealo*, 484 F. Supp. 719, 721 (E.D. Pa. 1980) (statements on the record by counsel are not evidence and may not substitute for the presentation of evidence required in considering the motion for summary judgment). *See also, Dartez v. Owens-Illinois, Inc.*, 910 F.2d 1291 (5th Cir. 1990) (statements in post-trial brief are not judicial admissions); *City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F. Supp. 1257, 1280 (N.D. Ohio 1980) (proposed findings of fact are informal suggestions for the assistance of the court, not formal pleadings, and do not constitute admissions).

The pre-trial memoranda filed by the parties in this case do not constitute summary judgment evidence. They were provided by the parties, at the request of the court, to guide the court on what issues would be presented at trial, if a trial were required.

The purpose of a pre-trial order is to reveal the lawyer's theory of the case and issues believed to be in contention in order to aid the court in determining what matters should be considered at the conference itself. *Ramsey v. Mellon Nat'l Bank & Trust Co.*, 33 F.R.D. 324 (W.D. Pa. 1963). Any admissions and statements made are only binding following entry by the court of a pre-trial order. *Taylor*, 320 F. Supp. at 1381. In the case at bar, no such entry was made by the trial court. Nor was any

order entered that otherwise indicated the trial court's adoption of either party's memoranda.

A determination by this Court that fact issues identified in a proposed pre-trial order constitute evidence or admissions for summary judgment purposes would defeat the purpose of Rule 16 which is to provide a mechanism for fostering better, more efficient trials. *Flannery v. Carroll*, 676 F.2d 126, 129 (5th Cir. 1982). As stated by the court in *Laird v. Air Carrier Engine Service, Inc.*, 263 F.2d 948, 954 (5th Cir. 1959):

> If counsel . . . must hold himself back for fear that if the hearing is unproductive or the result is abortive, the client may be faced with the prospect that his defender has suddenly become the admission-witness against him, pre-trial will stagnate. Counsel will be muzzled. The informal give and take, the exploration of areas of agreement and disagreement, now so productive of stipulation between responsible advocates, will have to end.

There is nothing in Rule 16 which would sanction the use of a proposed pre-trial order as an admission or other type of evidence under Rule 56. Such use, if proper at all, should occur only after the pre-trial conference and the actual entry of a pre-trial order. *Taylor, supra.* Here, no pre-trial order was ever signed, so Petitioners' argument is misplaced.

II. THE FIFTH CIRCUIT PROPERLY DETERMINED THAT PETITIONERS' CLAIMS UNDER SECTION 10(b) OF THE SECURITIES ACT OF 1934 AND SECTIONS 12(1) AND 12(2) OF THE SECURITIES ACT OF 1933 WERE TIME BARRED

Contrary to Petitioners' assertion, neither the Fifth Circuit nor the District Court held that "disclaimers in an offering memorandum served to absolutely shield Respondents from liability" under the securities laws (P. 18). What the lower courts did hold is that when presented with uncontroverted evidence which demonstrates that Petitioners discovered or should have discovered the alleged fraudulent conduct at the time Petitioners purchased their investment, it is proper to determine the running of limitations from the date of that event. Such a determination is consistent with the law of every circuit. *See: Kramas v. Security Gas & Oil Inc.*, 672 F.2d 766 (9th Cir. 1982) cert. denied 103 S. Ct. 444, 459 U.S. 1035, 74 L. Ed. 2d 600 (1982) (when uncontroverted evidence demonstrates that a party discovered or should have discovered the fraudulent conduct, summary judgment is proper); *Anixter v. Home-State Production Co.*, 939 F.2d 1420 (10th Cir. 1991) *modified* 947 F.2d 897 (10th Cir. 1991) (a party must plead and prove facts showing claim was timely to both one and three year limitation periods).

In *Lampf, Pleva, Lipkind, Prupis and Petrigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991), the Court determined that the applicable limitations period in a private suit brought pursuant to § 10(b) of the Securities Act of 1934 (15 U.S.C.A. § 78(b)) is the earlier of one year after the discovery of facts constituting

the violation or within three years after the violation. In addition, the Court held that the three-year limitation is designed to serve as a cut-off and, therefore, tolling principles do not apply. Finally, without discussion, the Court applied its decision retroactively making it clearly applicable to this case. Similarly, §§ 12(1) and 12(2) of the Securities Act of 1933 (15 U.S.C.A. §§ 77l(1) and (2) (1981)) are subject to a one and three-year limitation period. 15 U.S.C.A. § 77m.

Any alleged violations of the Securities Act occurred before Petitioners signed their Subscription Agreement and other documents. Since the Subscription Agreement contained disclosures and information contrary to what Petitioners had previously been told, Petitioners were charged with notice and under a duty to exercise reasonable diligence to investigate the alleged wrongdoing.

Kennedy v. Josephthal & Co., 814 F.2d 798 (1st Cir. 1987) is instructive. In that case, plaintiffs purchased shares of a limited partnership involved in the mining of coal. The Offering Memorandum disclosed not only the high degree of risk but the fact that, the partnership "would, in all likelihood, utterly fail as a viable coal mining operation." *Id.* at 801. Plaintiffs claimed they relied on oral statements which described it as a more positive, profitable and safe venture. Rejecting the argument that the defendant's continuing misrepresentations prevented discovery of the fraud, the court stated:

> Appellants need not, however, have fully discovered the extent of the fraud before they were on notice that something may have been amiss. Inquiry notice is triggered by evidence of the

> possibility of fraud, not full exposition of the scam itself.

Id. at 802. The court thus found that appellants were on notice when they examined the Offering Memorandum and compared it to their broker's contrary statements. Limitations expired one year later and barred their suit.

The District Court correctly recognized that all Petitioners except Steubing, Lacelle, Mikles and MJM Investments purchased their units in Onshore on or before November 30, 1984. Because Petitioners' lawsuit was not filed until December 3, 1987, the Securities Act claims of all but four Petitioners are absolutely barred.

As to the remaining four Petitioners, their claims were not brought within one year from the date of discovery. The District Court, relying on undisputed evidence in the record, determined that these Petitioners should have discovered the alleged misrepresentations no later than May 1, 1985, when they signed the Subscription documents which contained disclosures contrary to the oral promises they had allegedly received. Since this was more than one year before suit was filed and because the limitation periods are not disjunctive, these claims are barred by the one-year statute of limitations. *Anixter, supra.*

Petitioners did not direct the trial court to any portion of the record which would establish a disputed issue of material fact with respect to when Petitioners did or should have discovered any alleged violations of the securities laws. No affidavits or depositions were attached to Petitioners' Response, nor did Petitioners allege any deficiency in the form or substance of the

Motion. By refusing to offer any evidence in opposition to the Motion, Petitioners failed to provide any basis for potential liability against Rio Bravo or Gamble under the securities laws or that they discovered alleged violations of the securities laws prior to the running of limitations. Petitioners failed to respond to the Motion with "specific facts showing that there was a genuine issue for trial." *Celotex*, at 324.

CONCLUSION

The questions that Petitioners raise are neither special nor significant. The judgment of the District Court and subsequent affirmation by the Fifth Circuit Court of Appeals involves no unsettled questions of law and is entirely consistent with the prior rulings of the Court and other federal circuit courts. Accordingly, the petition should be denied.

Respectfully submitted,

STEPHEN W. SCHUELER
CHARLES M. SILVERMAN
Counsel of Record
MARGRAVES & SCHUELER, P.C.
601 Jefferson, Suite 2200
Houston, Texas 77002-7910
(713) 659-4800

Attorneys for Respondents, Rio Bravo Oil Co., Inc. and Bert Gamble

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL K. TOPALIAN, ET AL.	§	
Plaintiffs,	§	CIVIL ACTION NO. H-87-3826
vs.	§	
JOHN N. EHRMAN, ET AL.	§	
Defendants.	§	

DISCOVERY AND SCHEDULING ORDER

(Entered Mar. 21, 1989)

On January 3, 1989, the Court held a Pretrial Status and Scheduling Conference, which all parties or their attorneys attended, for the purpose of scheduling discovery and disposing of pretrial matters. It is therefore ORDERED:

That the Court's Pretrial and Discovery Order heretofore entered in this cause on June 27, 1988, is amended to the extent provided in this Order.

That only the discovery which is described in, or allowed by, this Order shall be allowed in connection with the above cause.

That the depositions described below shall be scheduled during the hours from 9:30 a.m. through 5:30 p.m. on the dates set forth below, and all counsel are expected to participate in, or attend, the depositions and other discovery ordered herein in accordance with this Schedule which is as follows:

1. January 4, 1989: Review documents produced by the "Ehrman Defendants" at the offices of Frank Pinedo.

2. January 5, 6 and 9, 1989: Oral deposition of Richard Manual at the offices of Frank Pinedo.

3. January 9, 1989: Bobby W. McDonald shall produce the documents ordered herein to be produced by him, at the offices of Frank Pinedo.

4. January 12 and 13, 1989: Continuation of the deposition of Bobby W. McDonald at the offices of Frank Pinedo.

5. January 25, 1989: Oral deposition of Rockwood Insurance Company at the offices of Butler & Binion.

6. February 1 and 2, 1989: Oral deposition of Frank Leggio at the offices of Butler & Binion. Plaintiff's counsel is hereby ORDERED to have a subpoena issued and served upon Frank Leggio compelling his appearance at the time and place ordered herein, which subpoena shall be accompanied by a copy of this Discovery and Scheduling Order.

7. February 8 and 9, 1989: Defendant Joel Middlebrook is hereby ordered to appear for the taking of her oral deposition at the offices of Butler & Binion at 1600 Allied Bank Plaza, Houston, Texas 77002 commencing at 9:30 a.m. on February 8, 1989 and continuing until 5:30 p.m. and commencing at 9:30 a.m. on February 9, 1989 and continuing until 5:30 p.m. or until completion of the deposition. Plaintiff's counsel is ORDERED to serve a copy of this Order

upon Defendant Joel Middlebrook by certified mail and by regular mail at her address at 2927 Drexel, Houston, Texas 77027, and proof of mailing of such notice by Plaintiff's counsel shall constitute service of notice of this order, the court observing that Joel Middlebrook appeared in open court on January 3, 1989 and received, verbally, the orders reduced to writing herein.

8. February 21 and 22, 1989: Oral deposition of Victor B. Russek to be held at the offices of Margraves, Kennerly & Schueler.

9. March 1, 1989: Oral deposition of Roy Jacobs at the offices of Margraves, Kennerly & Schueler.

10. March 2, 1989: Oral deposition of Michael K. Topalian at the offices of Margraves, Kennerly & Schueler.

11. March 8, 1989: Oral depositions of Warren B. Fienga commencing at 9:30 a.m. and Richard D. Mikels commencing at 1:30 p.m., each at the offices of Butler & Binion.

12. March 9, 1989: Oral depositions of Jean Steubing commencing at 9:30 a.m. and Jack E. Burroughs commencing at 1:30 p.m., each at the offices of Butler & Binion.

13. March 10, 1989: Oral depositions of Don Boyette commencing at 9:30 a.m. and MJM Investments and their representative, Mary Bell Lustick, commencing at 1:30 p.m., each at the offices of Butler & Binion.

14. March 14 through 17, 1989, inclusive: Oral deposition of John Ehrman at the offices of Frank Pinedo.

15. March 21 and 22, 1989: Oral deposition of Richard O'Donnell at the offices of Vinson & Elkins.

16. March 30, 1989: Oral deposition of Wayne M. Byles at the offices of Butler & Binion.

17. March 31, 1989: Oral deposition of Juan Garcia-Quiroga commencing at 9:30 a.m. at the offices of Butler & Binion.

18. March 31, 1989, Afternoon: Reserved for any additional deposition to be designated by any Defendant.

19. April 6, 1989: Oral deposition of Gideon Chern, as a representative of Inter-Discount Limited, at an address in Manhattan, New York City, New York to be designated by Plaintiff's counsel within ten (10) days of the date of this Order. Plaintiff's counsel is ORDERED to cause a subpoena for the witness to be issued and served upon him and to certify to all counsel of record, in writing, that such subpoena has been issued and served upon such witness not later than March 15, 1989. If such subpoena is not served, or if such certificate of such service is not issued, this deposition shall be cancelled.

20. April 13, 1989: Oral deposition of Robert Eckis, who is hereby ordered to appear at the offices of Campbell & Morris in Houston, Texas for the taking of his deposition; provided, however, that Plaintiff's counsel shall pay, or reimburse Defendant

Robert Eckis for his air fare, hotel accommodations and other reasonable and necessary expenses incurred by him to travel to Houston for the taking of his deposition; provided, further, that to the extent other parties participate in the deposition of Mr. Eckis, by asking questions, they shall bear a pro-rata portion of the travel expenses of Mr. Eckis; provided further that the entry of this Order, or the appearance of Robert Eckis for deposition pursuant hereto, shall be without prejudice to the Motion to Dismiss heretofore filed on behalf of Robert Eckis, and shall not constitute a waiver thereof.

21. April 20 and 21, 1989: Plaintiff shall take the oral depositions of the expert witnesses designated by Defendants Rio Bravo Oil Company, Bert Gamble, Houston Petroleum Company and Richard O'Donnell, at the offices of Vinson & Elkins.

22. April 26, 1989: Defendants shall take the deposition of any expert designated by Plaintiff. In this connection, the Court notes that (i) the time for Plaintiff to designate expert witnesses, under the Court's prior scheduling order, has passed, (ii) Plaintiff has designated no experts, (iii) Defendants object to any designation of experts by Plaintiff, and (iv) neither this Order, nor attendance at or participation in the taking of such deposition, shall constitute a waiver of any such objection. Any objection by Defendants to the designation of such experts by Plaintiff shall be considered separately by the Court.

23. April 27, 1989: Oral deposition of John McIntyre commencing at 9:30 a.m. at the offices of Frank Pinedo. Plaintiff's counsel is Ordered to cause a subpoena for the witness to be issued and served upon him and to certify to all counsel of record, in writing, that such subpoena has been issued and served upon such witness. If such subpoena is not served, or if such certificate of such services is not issued, this deposition shall be cancelled.

24. April 28, 1989: Reserved for the taking of any other depositions in this case which may be designated by any party.

That any Interrogatories or Requests for Production of Documents to be served by any party shall be served on or before January 31, 1989.

That with respect to Requests for Admissions:

1. No more than thirty (30) requests for admissions may be served upon any Defendant except pro se Defendants in which case no such limitation shall apply.

2. All Requests for Admissions of parties whose depositions have been completed shall be served on or before January 31, 1989.

3. Requests for Admissions for any other party shall be served within ten (10) days after the completion of such party's deposition.

That each Plaintiff is specifically ORDERED, prior to appearing for the deposition of such Plaintiff, to:

1. Review and familiarize themselves with all documents which were received, reviewed

or signed by any such Plaintiff, or relied on by any such Plaintiff, or which any such Plaintiff claims contains any misrepresentations or omissions.

2. To the extent that Plaintiffs may have produced copies of such documents previously, each Plaintiff is ordered to go to the offices of Plaintiff's counsel, or such other place as may be necessary to obtain and review a copy of all documents required to be produced by this Order.

3. Produce, at the time and place of the taking of such Plaintiff's deposition, all documents which were received, reviewed or signed by such Plaintiff, or relied on by such Plaintiff, or which such Plaintiff claims contain any misrepresentations or omissions, together with any other documents which have been requested to be produced by any of the Defendants, in a Request for Production of Documents or in a Deposition Notice.

That Plaintiffs admit that Plaintiff Roy Jacobs is an "accredited investor" and, by January 9, 1989, Plaintiff's counsel shall designate, in writing, any other Plaintiffs which admit that they are "accredited investors".

That Plaintiff Bobby W. McDonald is hereby specifically ORDERED to produce, at 10:00 o'clock a.m. on January 9, 1989, at the offices of Frank Pinedo, all of the following:

1. All financial and accounting records maintained by, or on behalf of, Plaintiff Bobby W. McDonald for (i) all Plaintiffs (other than Roy Jacobs and any other Plaintiff which Plaintiff's counsel certifies as an accredited

investor), (ii) all persons or entities who invested, sent funds to or at any time owned an interest in On-Shore Exploration Limited 1984 Mid-Year Drilling Program ("On-Shore"), and (iii) any of the Defendants herein.

2. All calendars and notes of meetings, transactions and conversations maintained by or on behalf of Plaintiff Bobby W. McDonald.

3. All police reports referred to in the deposition of Plaintiff Bobby W. McDonald.

4. All other documents requested to be produced during the deposition of Plaintiff Bobby W. McDonald on December 29, 1988.

That all accountant/client privileges asserted by Plaintiff Bobby W. McDonald does not exist, and it shall not be asserted by Plaintiff Bobby W. McDonald.

That all depositions shall be transcribed, in writing, by a stenographer or court reporter, but any party may videotape any deposition ordered herein, which videotape, if offered in evidence, must comply with the requirements for admission into evidence of a videotaped deposition.

That any request for a protective order with respect to non-parties or their representatives attending depositions ordered in this case is denied.

That the deadline for completion of discovery shall be April 30, 1989.

That the deadline for filing Motions shall be June 15, 1989; provided that, for any Motion filed by any party

between June 1, 1989 and June 15, 1989, the response and submission date shall be July 10, 1989.

That, by August 1, 1989, Plaintiff's counsel shall furnish to all Defendants' counsel, including pro se Defendants, a proposed Joint PreTrial Order, in compliance with the requirements of this Court, and the Local Rules and Federal Rules of Procedure.

That the Final Joint PreTrial Order shall be filed by August 21, 1989.

That this case shall be set for docket call on August 28, 1989 at 9:30 o'clock a.m.

That the week of July 24, 1989, shall be reserved for a further Status Conference or Final PreTrial Conference, or for the hearing and disposition of Motions pending at that time. Such Status and PreTrial Conference shall be held on July 28 at 9:30 o'clock a.m. or such date and time as the Court may later designate.

SIGNED at Houston, Texas this 20th day of March, 1989.

/s/ Norman Black
PRESIDING JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL K. TOPALIAN, ET AL Plaintiffs, VS. JOHN N. EHRMAN, ET AL Defendants.	§ § § § § § § § § §	CIVIL ACTION NO. H-87-3826 (Filed June 15, 1989)

DEFENDANTS RIO BRAVO OIL COMPANY AND BERT GAMBLE'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Defendants Bert Gamble ("Gamble"), individually and in his capacity as President of Rio Bravo Oil Company, and Rio Bravo Oil Company ("Rio Bravo") move this Court as follows:

1. That this Court should dismiss Plaintiffs' First Amended Complaint (the "Complaint") as to these Defendants because the Complaint does not state a claim upon which relief can be granted, or in the alternative, this Court enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in favor of Gamble and Rio Bravo on the ground that there is no genuine issue as to any material fact and that Gamble and Rio Bravo are entitled to judgment as a matter of law.

2. A memorandum in support of this motion to dismiss or, in the alternative, motion for summary judgment is filed concurrently with this motion.

3. This Motion is supported by the affidavit of Gamble, attached hereto as Exhibit No. 1.

4. This Motion is further supported by excerpts from the following depositions:

a. Bert Gamble;

b. Jack Burroughs;

c. Marybelle Lustick;

d. Juan Garcia-Quiroga;

e. Michael Topalian;

f. Richard Manuel; and

g. Jean Steubing.

(references to these depositions in the Memorandum shall be by deponent, page [p.], and line [l.]).

5. This Court indicated after Rio Bravo and Gamble filed their Motion to Dismiss during the early stages of this case that they may re-urge their Motion after the parties have had a reasonable time to conduct discovery. The parties have had sufficient time to conduct discovery and at this time Rio Bravo and Gamble are re-urging their Motion to Dismiss, or, in the alternative Motion For Summary Judgment.

6. The filing of the Complaint violates Federal Rule of Civil Procedure 8 because it is not a short and plain statement of the claim, but is instead a vague, repetitive and rambling pleading that does not contain any facts to support its summary allegations against Rio Bravo or Gamble.

7. The Complaint fails to state a cause of action under state securities law or, in the alternative there is not genuine issue of any material fact and Rio Bravo and Gamble are entitled to judgment as a matter of law.

8. The Complaint fails to plead a cause of action for common law fraud, or in the alternative there is no genuine issue as to any material fact and Rio Bravo and Gamble are entitled to judgment as a matter of law.

9. The Complaint fails to state a cause of action under Section 17(a) of the Securities Act of 1933.

10. The Complaint fails to state a cause of action under Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder or, in the alternative there is no genuine issue as to any material fact and Rio Bravo and Gamble are entitled to judgment as a matter of law.

11. The Complaint fails to state a claim under Section 12(2) of the Securities Act of 1933 or, in the alternative there is no genuine issue as to any material fact and Rio Bravo and Gamble are entitled to judgment as a matter of law.

12. The Complaint fails to state a claim for relief under 18 U.S.C. §1962 or, in the alternative there is no genuine issue as to any material fact and Rio Bravo and Gamble are entitled to judgment as a matter of law.

13. This Court should decline to exercise pendent jurisdiction over the state law claims asserted by Plaintiffs.

Defendants Rio Bravo and Gamble request that the Court grant this Motion to Dismiss or, in the alternative,

Motion For Summary Judgment and award all other relief to which it is entitled.

Respectfully submitted,

BY: /s/ Stephen W. Schueler
Stephen W. Schueler
Federal I.D. No. 5126
Neil A. Wasserstrom
Federal I.D. No. 6391
2200 Dresser Tower
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713/659-4800

OF COUNSEL:

MARGRAVES, KENNERLY & SCHUELER,
A Professional Corporation
2200 Dresser Tower
601 Jefferson
Houston, Texas 77002-7910

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on this the 15th of June, 1989 a true and correct copy of the above and foregoing Defendants Rio Bravo Oil Company and Bert Gamble's Motion To Dismiss Or, In the Alternative, Motion For Summary Judgment was mailed by certified mail, return receipt requested to counsel for Plaintiffs, Armando Lopez, 2990 Richmond, Suite 205, Houston, Texas, 77098 and to all other counsel of record and Pro Se Defendants by first class mail, postage prepaid.

/s/ Stephen W. Schueler
STEPHEN W. SCHUELER

Exhibit No. 1

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL K. TOPALIAN, ET AL	§	
	§	
Plaintiffs,	§	CIVIL ACTION NO.
	§	H-87-3826
VS.	§	
JOHN N. EHRMAN, ET AL	§	
	§	
Defendants.	§	
	§	

AFFIDAVIT OF DEFENDANT BERT GAMBLE IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

THE STATE OF TEXAS	§
	§
COUNTY OF HARRIS	§

BEFORE ME, the undersigned authority on this day personally appeared BERT GAMBLE, known to me to be the person who, after being duly sworn, upon his oath did depose and state as follows:

> "I am President of Rio Bravo Oil Company ("Rio Bravo"). Neither I nor Rio Bravo had any contact, communication, or involvement with any of the plaintiffs or any other limited partners of Onshore Exploration, Ltd., 1984 Mid-Year Drilling Program ("Onshore") in connection with the offering or sale of limited partnership interests.

"Neither Rio Bravo nor I was involved in the organization, operation, or internal workings of Onshore or in the raising of capital by Onshore or the selling of limited partnership interests in Onshore. Further, neither Rio Bravo nor I have ever acquired, maintained, or owned any interest in Onshore, or in any way established, operated, or controlled Onshore.

"Victor Russek, an independent oil and gas geologist, who Rio Bravo has used on several other occasions to screen and recommend oil and gas prospects and find participants for its drilling programs, brought Onshore to Rio Bravo as a participant in Rio Bravo's drilling programs.

"On or about December 17, 1984, Onshore and Rio Bravo entered into two letter agreements and operating agreements covering drilling on the Southeast Ceuro and Sheriff prospects (the "Prospects"). Copies of the letter agreements and operating agreements are attached to this Affidavit as Exhibit "A-1" and incorporated herein.

"Rio Bravo was the operator on the Prospects, while Onshore was merely one of several passive "non-operator" participants in the Prospects. Each non-operator participant in the Prospects signed the same model form operating agreements that contained essentially the same terms and conditions as the operating agreement signed with Onshore. Each non-operator participant was required to pay its pro rata share of the costs of drilling the wells based on

each participant's respective interest in the Prospects. The costs charged under the letter agreements were normal and customary in the industry.

"At the time Onshore requested to participate in the Prospects, Rio Bravo agreed to Onshore's request to insert a clause in the respective letter agreements providing, that in the event that Onshore was not able to obtain the necessary financing from its lender to pay its proportionate share of the costs necessary for drilling, then Onshore could elect to terminate its participation in the Prospects. Rio Bravo was committed to drill the Prospects with or without Onshore, by its agreement with the other participants who each had paid their pro rata share of the costs of drilling. When Onshore did not elect to withdraw and Onshore paid its pro rata costs of drilling, Rio Bravo assumed that neither Onshore nor any of its partners had any objection to the participation by Onshore in the Prospects. Prior to the institution of this suit, nether Rio Bravo nor I had any notice or knowledge that Onshore or any of its partners had any objection to the participation by Onshore in the Prospects, or regarding the minimum subscriptions required by Onshore or the number of subscriptions received by Onshore. Rio Bravo performed its obligations under the operating agreements as required.

"None of the other non-operator participants, who are unrelated to Rio Bravo and me and the other parties in this action, has complained about its investment in the Prospects.

"It is standard industry practice to engage an independent geologist to screen and recommend

oil and gas prospects and find participants for drilling programs. As mentioned above, Rio Bravo on several occasions has paid Victor Russek for screening and recommending prospects and participants in Rio Bravo's drilling programs. Rio Bravo paid Victor Russek a fee for referring Onshore to its Prospects. Neither Rio Bravo nor I have any knowledge of any relationship or fee arrangement, if any, between Onshore and Victor Russek.

"Prior to the institution of this lawsuit, neither Rio Bravo nor I had any contact with any of the other Defendants in this lawsuit other than the normal business dealings Rio Bravo had with all the non-operator participants in the Prospects.

"All of my acts and communications related to the Prospects or Onshore were made in my representative capacity on behalf of Rio Bravo as its President, and not in my individual capacity."

EXECUTED this 15 day of June, 1989.

/s/ Bert Gamble
BERT GAMBLE,
President,
Rio Bravo Oil Company

SUBSCRIBED and SWORN TO BEFORE ME by the said Bert Gamble in the capacity therein stated, this the 15th day of June, 1989.

/s/ Gwynne L. Diephuis
Notary Public in and for
The State of Texas

My Commission Expires:

November 30, 1992

(seal)
GWYNNE L. DIEPHUIS
NOTARY PUBLIC,
STATE OF TEXAS
MY COMMISSION EXPIRES
NOV. 30, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL K. TOPALIAN, ET. AL.,	§	CIVIL
	§	ACTION
PLAINTIFFS,	§	NO. H-87-3826
	§	
VS.	§	
	§	
JOHN N. EHRMAN, ET. AL.,	§	
	§	
DEFENDANTS.	§	

PLAINTIFFS' RESPONSE TO THE RIO BRAVO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

To the Honorable Judge of said Court:

COME NOW **Michael K. Topalian, et al.**, Plaintiffs in the above styled and numbered cause, and file this their response in opposition to the Rio Bravo Defendants' (**Rio Bravo Oil Company, Inc.** and **Bert Gamble**) Motion For Summary Judgment.

The Rio Bravo Defendants' Motion for Summary Judgment is frivolous. It represents a last-ditch effort by these Defendants to avoid a trial of this complex securities fraud and RICO case in which the evidence will clearly show that the Rio Bravo Defendants and others engaged in acts and practices which operated as a fraud or deceit upon Plaintiffs in connection with the sale of securities.

Plaintiffs, in their First Amended Complaint (paragraphs 62-78), raise, in a clear and detailed manner, a number of serious allegations against the Rio Bravo

Defendants. Furthermore, Defendant Gamble's deposition Exhibit No. 27 clearly shows that the Rio Bravo Defendants participated in the solicitation of potential investors. (Plaintiff's Exhibit "A") This exhibit is a brochure together with an agenda for a presentation that was made in solicitation of prospective buyers of Partnership units. The second page of this brochure/agenda lists Defendant Rio Bravo Oil Company and its president, Defendant Bert Gamble, as Participants in this "seminar". Defendant Bert Gamble addressed the potential investors with regard to the type of prospects that were to be drilled on behalf of the Partnership.

Plaintiffs contend, among other things, that the solicitations by the Rio Bravo Defendants of potential investors in a general, "seminar" style gathering is a violation of Rule 502(c) of Regulation D, Promulgated, pursuant to the Securities Act of 1933. Moreover, the Rio Bravo Defendants knew that they would benefit financially from the sales of the securities units. *See Dahl v. Pinter*, 56 U.S.L.W. 4579, 4588 (1988). Accordingly, the Rio Bravo Defendants are liable under Sections 12(1) and 12(2) of the 1933 Securities Acts, in addition to their violations of Rule 10b-5 and the RICO statute.

Plaintiffs, at a minimum, can clearly establish that the Rio Bravo Defendants aided and abetted the securities violations alleged in the Complaint. In this regard, Plaintiffs contend that this evidence (Plaintiffs' Exhibit "A") shows that these Defendants had more than just a "general awareness" of their role in the Rule 10b-5 violations and that they knowingly rendered "substantial assistance" in the violations. *See Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1126 (5th Cir. 1988). Additionally, like

the Houston Petroleum and Kelley Onshore Defendants, the Rio Bravo Defendants disregarded the terms and conditions of the Offering Memorandum and commenced drilling operations before Onshore was funded.

Plaintiffs' claims under the RICO statute are equally strong in view of prevailing precedent. *See generally, H. J., Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (U.S. June 27, 1989), *reversing and remanding* 829 F.2d 648 (8th Cir. 1987); *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479 (1985); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th. Cir. 1985), *cited in H. J., Inc. v. Northwestern Bell Telephone Co., supra*, 57 U.S.L.W. at 4952 note 2.

Accordingly, the Rio Bravo Defendants' contention that there is no genuine issue as to any material fact is on its face preposterous, especially given the complex facts of this case. If ever there was a case that was inappropriate for summary judgement [sic], this is it. The Rio Bravo Defendants' Motion for Summary Judgement [sic] is clearly part of a large effort of certain Defendants to avoid their day of reckoning by unnecessarily burdening Plaintiffs' counsel with paperwork. These Defendants' only hope at this point is that this Court will dismiss them from this lawsuit on any grounds possible so long as the ruling takes place prior to a trial on the merits. What Defendants want is a trial by deposition and affidavits; they fear the testimony that will be presented at trial which establishes their culpability. However, on this record, Plaintiffs are entitled to have this Court resolve the multitude of issues involving these Defendants in a trial on the merits.

1. **THE SECURITIES VIOLATIONS**. The Rio Bravo Defendants are apparently asserting that they had no duty to disclose anything to the investors because they lacked a fiduciary or other similar relationship of trust and confidence vis-a-vis the investors. They also implicitly deny any liability for aiding and abetting securities laws violations, among other things.

The Rio Bravo Defendants' contentions are without merit. Plaintiffs contend that the evidence will establish these Defendants' culpability in the scheme to defraud the Plaintiffs under Rule 10b-5. As the Fifth Circuit has noted, coverage under Rule 10b-5 is not a limited one. *Hilgeman v. National Ins. Co. of America*, 547 F.2d 298, 302 (5th Cir. 1977). The Rule, among other things, prohibits any person from engaging in "any act, practice or course of business which operates or would operate as a fraud or deceit upon any person." *Hilgeman, supra*, Section 240.10b-5.

Plaintiffs possess evidence which will establish that Defendants were participants in a scheme to enrich themselves and others at the expense of the Plaintiffs-investors. Plaintiffs will also be able to establish that the Rio Bravo Defendants knowingly rendered substantial assistance to others who violated Rule 10b-5.

Plaintiffs assert that the Rio Bravo Defendants engaged in acts which operated as a fraud upon the Plaintiffs in connection with the selling of securities. At the trial on the merits, Plaintiffs will be able to clearly show that they suffered an injury as a result of deceptive practices "touching" the sale of securities to them within the meaning of Section 10b of the 1934 Securities

Exchange Act. *Cf. Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 10-13 (1971).

Accordingly, Plaintiffs must be given the opportunity to prove that the Rio Bravo Defendants not only aided and abetted violations of the securities laws but engaged in acts and business practices which operated as a fraud or deceit upon Plaintiffs in connection with their purchases of securities.

The Rio Bravo Defendants' implied assertion that they had no duty to disclose anything to the investors is without merit. As the Supreme Court stated in *Dirks v. SEC*, 463 U.S. 646, 655 n. 14 (1983), under certain circumstances even outsiders may become fiduciaries of investors where confidential information is legitimately revealed to an underwriter, accountant, lawyer, consultant or other persons solely for business purposes. That certainly, at a minimum, is the case here since Rio Bravo Oil Company was a joint-venturer in the project. Furthermore, it is also clear that one who missappropriates [sic] material information to his own advantage violates Section 10(b) and Rule 10b-5. *Cf. SEC v. Materia*, 745 F.2d 197, 203 (2d Cir. 1984); *Carpenter v. United States*, 791 F.2d 1024, 1027-1034 (2d Cir. 1986), *aff'd by an equally divided court on the 10(b) issue*, ___ U.S. ___ 108 S.Ct. 316, 320 (1987). Congress has now made clear that liability is not dependant [sic] on a fiduciary relationship but applies to *any person* buying or selling while in possession of material undisclosed information and any persons communicating this information to others. *See "Insider Trading and Securities Fraud Enforcement Act of 1988"*, Sections 20A (a)(b)(c)(d) as amended, Pub. Law 100-704, 102 Stat. 4677 (November 11, 1988).

There is no doubt that the Rio Bravo Defendants were privy to, and benefited from, material, undisclosed information. Such information was bought from Defendant Russek, Onshore's geologist, to whom Rio Bravo paid at least FIFTEEN THOUSAND ($15,000.00) DOLLARS for the Onshore referral. This admission was made by Defendant Bert Gamble during deposition testimony on December 20, 1988.

Accordingly, it is clear that there are many contested issues to be resolved with respect to the Rio Bravo Defendants' liability under Rule 10b-5.

Similarly, there are numerous fact questions to be resolved concerning the Rio Bravo Defendants' liability under sections 12(1) and 12(2) of the 1933 Securities Act. As mentioned earlier, there is evidence that the Rio Bravo Defendants were active participants in the solicitation of potential investors. Certainly, the Rio Bravo Defendants were motivated, at least in part, by a desire to serve their own financial interests. Accordingly, there are genuine issues of fact concerning the Rio Bravo Defendants' liability under the 1933 Securities Acxt [sic]. *See generally, Pinter v. Dahl*, 56 U.S.L.W. 4579, 4588 (1988).

2. **RICO VIOLATIONS**. The Rio Bravo Defendants' argument that Plaintiffs have failed to make out a RICO case against them is equally without merit. These arguments are particularly inappropriate here. Plaintiffs have gone to great lengths to plead this case with clarity and specificty [sic]. What Defendants are really requesting is that Plaintiffs prove their case in their Complaint.

Moreover, Defendants' memorandum conveniently omits any discussion of controlling cases that undermine

their arguments. *See H. J., Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (U.S. June 27, 1989), *reversing and remanding* 829 F.2d 648 (8th Cir. 1987); *R.A.G.S. Couture. Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985).

Throughout the text of their Complaint, Plaintiffs clearly detail that they were fraudulently induced to make sizeable [sic] investments of money in an "Enterprise" which was conceived, developed and operated for the unjust enrichment of the Defendants. The "Enterprises" referred to are clearly the limited partnerships – Onshore Exploration Ltd., 1984 Mid-Year Drilling Program in one instance, and Texas Energy Ltd., in the other. Thus, it is plain to see that Plaintiffs are not referring to Ehrman Investment Group, Inc., or any of the other Defendants as the "Enterprise."

Plaintiffs do contend, however, that Defendants Ehrman and Ehrman Investment Group, Inc. and the Rio Bravo Defendants, *inter alia*, conducted or participated, directly or indirectly, in the limited partnership – the Enterprise – through a pattern of racketeering activity in violation of 18 U.S.C. 1962 (c). Plaintiffs will show at trial how the various Defendants constituted an association of organizations that regularly engaged in the practice of selling and financing investments in oil and gas limited partnerships through fraud, omissions of material facts and other unlawful acts.

To require Plaintiffs to conclusively prove these matters prior to trial is not required. However, Plaintiffs contend that they will be able to prove their case if given the opportunity.

Defendants' contention that Plaintiffs will not be able to show a pattern of racketeering activity is similarly without merit. In *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1354 (5th Cir. 1985), the Fifth Circuit read the "pattern and other requirements of the RICO Act broadly. The Court noted that the mailing of two (2) invoices alleged by plaintiff to be fraudulent was sufficient to constitude [sic] a pattern of racketeering activities". *R.A.G.S. Couture, Inc. v. Hyatt, supra*, 774 F.2d at 1354. The Supreme Court recently cited this case and holding in its most recent decision on RICO. *See H. J., Inc., v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951, 4952, n. 2 (1989).

In this case, Plaintiffs have alleged financial injuries as a result of various predicate acts, including violations of Section 10(b) and federal mail and wire fraud statutes. These allegatiions [sic] are sufficient to withstand a motion to dismiss. *Corwin v. Marney Orton Investments*, 788 F.2d 1063, 1069 (5th Cir. 1986). Moreover, Plaintiffs will be able to show "acts (on the part of Defendants) that have the same or similar purposes, results, participants, victims, or methods of commission," and that are otherwise "interrelated by distinguishing characteristics." *Sedima, S.P.R.L v. Imrex Company, Inc.*, 473 U.S. 479, 496 at note 14 (1985). *Accord: H. J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951, 4953 (1989). Accordingly, Plaintiffs believe that they have a strong case against Defendants.

As the Fifth Circuit stated in *R.A.G.S Couture, Inc. v. Hyatt, supra*, 774 F.2d at 1355:

> "The scope of the civil RICO statute is breathtaking. An allegation of fraud in a contract action can transform an ordinary state claim into

> a federal racketeering charge. It may be unfortunate [sic] for federal courts to be burdened by this kind of case, but it is not for this court to question policies decided by Congress and upheld by the Supreme Court." *Id.*

Plaintiffs contend that they will be able to prove their RICO allegations at the trial of this case under any of the standards referred to by Defendants in their memorandum. The acts of the Defendants in this case which were perpetrated against the Plaintiffs were the result of their participation, directly or indirectly, in the affairs of the Parternship [sic] through a pattern of racketeering activity. Plaintiffs are entitled to their day in court in order to prove their case.

CONCLUSION

This difficult and complex case is clearly inappropriate for summary judgement [sic]. This is especially true for these Defendants since Plaintiffs are still in the process of taking deposition testimony of other Defendants, and have yet to depose one of the central figures in the "scheme", Defendant John N. Ehrman. The granting of summary judgment without the benefit of Ehrman's testimony, which is crucial to this case, would surely result in a miscarriage of justice for all concerned, especially Plaintiffs.

Factual issues abound with respect to every issue in this case. Congress has given this Court jurisdiction over defendants such as the Rio Bravo Defendants and empowered this Court to award appropriate relief. Plaintiffs will be able to clearly establish at trial that the Rio

Bravo Defendants have played an important and substantial role in an intricate scheme to mislead and defraud investors for the personal gain of the Defendants. Plaintiffs are entitled to their day in court. Accordingly, Plaintiffs respectfully pray that the Rio Bravo Defendants' Motion for Summary Judgment be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Armando Lopez, hereby certify that a true and correct copy of the foregoing instrument has been hand delivered to the Rio Bravo Defendants, by and through their attorney of record, Mr. Neil Wasserstrom, MARGRAVES, KENNERLY & SCHUELER, 2200 Dresser Tower, 601 Jefferson, Houston, Texas 77002, and by U.S. First Class Mail to all other counsel of record and pro-se parties on this the 27th day of July, 1989.

/s/ Armando Lopez
Armando Lopez

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL TOPALIAN, ET AL, PLAINTIFFS,	§	CIVIL ACTION
vs.	§	NO. H-87-3826
JOHN N. EHRMAN, ET AL, DEFENDANTS.	§	(Filed Aug. 7, 1989)

REPLY OF DEFENDANTS RIO BRAVO OIL COMPANY AND BERT GAMBLE TO PLAINTIFFS' RESPONSE TO THE RIO BRAVO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Bert Gamble, individually and in his capacity as President of Rio Bravo Oil Company ("Gamble"), and Rio Bravo Oil Company ("Rio Bravo") respectfully file this Reply to Plaintiffs' Response to the Rio Bravo Defendants' Motion for Summary Judgment.

Introduction

On June 15, 1989, Defendants Gamble and Rio Bravo moved this Court to dismiss Plaintiffs' First Amended Complaint (the "Complaint") as to these Defendants for failure to state a claim upon which relief can be granted, and alternatively moved this Court to grant a summary judgment in favor of Defendants Gamble and Rio Bravo on the ground that there is no genuine issue as to any material fact and that Gamble and Rio Bravo are entitled to judgment as a matter of law. Gamble and Rio Bravo also filed an affidavit, excerpts from depositions, and a memorandum in support of this motion (the "Motion").

On July 28, 1989, Plaintiffs filed their Response to the Rio Bravo Defendants' Motion for Summary Judgment (the "Response"). The Response, with its vague, unsupported, and irrelevant statements of counsel, further serves to indicate that dismissal of the claims against Gamble and Rio Bravo or summary judgment in favor of Gamble and Rio Bravo is appropriate. Plaintiffs failed to address many of the points made in the Motion and supporting memorandum, and the arguments that Plaintiffs did make are cursory and conclusory. Plaintiffs have failed to state any claim upon which relief can be granted against Gamble or Rio Bravo, and in their Response Plaintiffs have not cured this fatal defect nor have they provided any of the necessary support required to defeat the motion of Gamble and Rio Bravo for summary judgment.

Standards for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552-3 (1986). Further, "Rule 56(e) therefore requires the non-moving party to go beyond the pleadings and by her own affidavits, or by the 'definitions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 2553. Rule 56 requires "that a Plaintiff adduce evidence, not merely

argument, in response to a Defendant's properly supported motion for summary judgment." *Foval v. First National Bank of Commerce in New Orleans*, 841 F.2d. 126, 129 (5th Cir. 1988); *Fontenot v. Upjohn Co.*, 780 F.2d. 1190, 1195 (5th Cir. 1986).

"On a motion for summary judgment, the opponent bears the burden of establishing that there are genuine issues of material fact, and may not wait until trial or appeal to develop claims or defenses in response to the summary judgment motion." *C.F. Dahlberg & Co., Inc. v. Chevron U.S.A., Inc.*, 836 F.2d. 915, 920 (5th Cir. 1988); *Golden Oil Co. v. Exxon Co., U.S.A*, 543 F.2d. 548, 551 (5th Cir. 1976). "The nonmovant may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts, particularly where, as here, ample time and opportunities for discovery have already lapsed." *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d. 129, 137 (5th Cir. 1987), *S.E.C. v. Spence & Green Chemical Co.*, 612 F.2d. 896, 901 (5th Cir. 1980).

Plaintiffs Have Failed to Provide the Support Required to Defeat the Motion for Summary Judgment

Plaintiffs have failed to go beyond their vague pleadings and offer specific facts showing that there is a genuine issue for trial. Plaintiffs are unable even to produce an affidavit of any of the Plaintiffs in support of their claims against Gamble and Rio Bravo presumably, as indicated by the excerpts from the depositions of the Plaintiffs attached to the Motion, because no Plaintiff has any knowledge of any facts supporting any claim against Gamble or Rio Bravo.

Plaintiffs have chosen to ignore their burden under Rule 56 to introduce evidence to demonstrate the existence of a fact issue, and have instead elected (presumably because they have no other choice as no such evidence exists) to attempt to wait until a trial to produce any evidence in support of their claims. The Response is replete with phrases such as "Plaintiffs contend that the evidence will establish" (page 4), "Plaintiffs possess evidence which will establish" (page 4), "At the trial on the merits, Plaintiffs will be able to clearly show" (page 5), "Plaintiffs will show at trial" (page 8), "Plaintiffs contend that they will be able to prove their case" (page 8), and "Plaintiffs contend that they will be able to prove" (page 9). However, the Response is devoid of any actual evidence necessary to defeat the motion of Gamble and Rio Bravo for summary judgment. "At some point in every case, plaintiff must lay down the shield of non-specific 'possibilities' and come forth with specific facts which, if proved, will actually establish liability on the part of the defendant. For these plaintiffs, that time is now. They have failed to do so after having been granted every reasonable opportunity." *McLemore v. Landry*, 668 F.2d. 531 (M.D.La. 1987). As in *McLemore*, this Court should "now slam the door on the civil RICO claims" and other claims of the Plaintiffs against Gamble and Rio Bravo.

The only evidence to which Plaintiffs even attempt to make reference are a brochure attached as an exhibit to Gamble's deposition and then later Gamble's deposition itself. The exhibit, Exhibit "27" to Gamble's deposition and attached to this Reply as Exhibit "A", makes no reference at all to Onshore Exploration, Ltd., 1984 Mid-

Year Drilling Program ("Onshore"), the limited partnership involved in this case, and on its face relates only to Texas Energy Limited (TEL). Plaintiffs have previously attempted to amend their pleadings to add claims regarding this same partnership, and the Court has on three occasions refused to permit such amendment. This exhibit is no evidence at all regarding Plaintiffs' claims relating to Onshore.

Plaintiffs also refer to deposition testimony given by Gamble on December 20, 1988, as containing some sort of an admission that Gamble or Rio Bravo benefited from material, undisclosed information and that such information was purchased from Defendant Victor Russek. Plaintiffs do not give the Court the courtesy of citing any particular page or line of this 226 page deposition upon which they are relying. However, upon extensive review of the deposition of Gamble, it appears that approximately 36 pages refer to Victor Russek. These pages are attached as Exhibit "B" to this Reply. Of these pages, only approximately 8 pages refer in any way to any payments made to Mr. Russek. These pages, pages 190-4, 196-7, and 206, are attached hereto as Exhibit "C". As is apparent from these excerpts, the deposition of Gamble does not in any way contain any admission that Rio Bravo or Gamble "were privy to and benefited from, material, undisclosed information" or that "such information was bought from Defendant Russek, Onshore's geologist, to whom Rio Bravo paid at least $15,000 for the Onshore referral", as Plaintiffs attempt to indicate in the Response. The deposition testimony of Gamble indicates merely that Rio Bravo paid a commission to Victor Russek for referring Onshore to Rio Bravo as a participant in the drilling prospects of

Rio Bravo. There is no discussion, much less an admission, of any material, undisclosed information that Gamble or Rio Bravo were privy to, benefited from, or purchased from Defendant Russek. These statements in the Response are merely the allegations of Plaintiffs' counsel. They are not a correct report of the contents of the deposition.

Other Issues

The Response indicates that Plaintiffs are somewhat unsure or unsettled as to the identity of the "enterprise" for purposes of their RICO claims. In their Response to Court's Standing RICO Order, Plaintiffs stated that Onshore was the enterprise. However, in the Response, the Plaintiffs refer to both Onshore and TEL as the enterprises, and also they seem concerned as to whether Ehrmann Investment Group, Inc. may have been construed as the enterprise, as to which Gamble and Rio Bravo had not made any reference whatsoever.

Plaintiffs cite *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d. 1350 (5th Cir. 1985) and *H.J. Inc. v. Northwestern Bell Telephone Company*, ___ U.S. ___, 57 U.S.L.W. 4951 (1987) as supporting Plaintiff and as indicating that two alleged fraudulent acts are sufficient to constitute a pattern of racketeering activities under RICO. Plaintiffs note that *H.J. Inc.* cited *R.A.G.S. Couture, Inc.* However, Plaintiffs failed to note that the Supreme Court cited *R.A.G.S. Couture, Inc.* only in a footnote indicating the conflict of authority among the Courts of Appeal, and effectively overruled *R.A.G.S Couture, Inc.* in stating "[n]or can we agree with those courts that have suggested that a pattern

is established merely by proving two predicate acts. . . ." *H.J. Inc. v. Northwestern Bell Telephone Company*, 57 U.S.L.W. 4951, 4952 (1989). Further, the language quoted on page 8 of the Response purportedly taken from *R.A.G.S. Couture, Inc.* is not in that case.

The Plaintiffs also attempt to raise some red herrings by citing in the Response some cases and a statute relating to insider trading. These cites have no relationship to the issues at hand, as there has been no claim, much less any evidence tending to indicate, that Gamble or Rio Bravo traded in any securities, nor have Plaintiffs produced any evidence tending to indicate that Gamble or Rio Bravo was an insider with respect to Onshore.

Conclusion

As interpreted by the United States Supreme Court, Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. As indicated in the Motion and the memorandum supporting the Motion and in this Reply, Plaintiffs have failed to state a claim upon which relief may be granted and have failed to make a showing sufficient to establish the existence of *any* element essential to their claims. Accordingly, Defendants Rio Bravo Oil Company and Bert Gamble respectfully request that the Complaint be dismissed as against Rio Bravo and Gamble for failure to state a claim upon which relief may granted, or in the

alternative that the Court enter a summary judgment in favor of Rio Bravo and Gamble.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on this the ___ day of August, 1989, a true and correct copy of the above and foregoing Reply of Defendants Rio Bravo Oil Company and Bert Gamble to Plaintiffs' Response to the Rio Bravo Defendants' Motion for Summary Judgment was mailed by certified mail, return receipt requested, postage pre-paid, to counsel for Plaintiffs, Armando Lopez, at 2990 Richmond, Suite 205, Houston, Texas 77098, and forwarded to all counsel of

record and pro se Defendants by first class mail, postage pre-paid.

/s/ David M. Washburn
DAVID M. WASHBURN